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IN THE

Supreme Court of the United States

October Term, A. D. 1956

No. 302

CORNELIUS VANDERBILT, JR.,
Petitioner,

—v.—

PATRICIA W. VANDERBILT,

—and—

THOMAS F. McCOY, Receiver and Sequestrator,
Respondents.

RESPONDENT'S BRIEF ON CERTIORARI

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MONROE J. WINSTEN,
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Counsel for Respondent.

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Question Presented

Does the New York judgment herein, which awarded alimony to respondent and recognized petitioner's prior Nevada *ex parte* divorce decree in so far as it dissolved the marital status, deny full faith and credit to the Nevada decree?

Statement

Petitioner (husband) seeks review of that portion of the judgment of the New York Supreme Court dated March 30, 1955 (R. 2), affirmed by the New York Court of Appeals (R. 554, 556), as awards respondent Patricia W. Vanderbilt

(wife) maintenance and counsel fees, and as directs the sequestrator to pay the same (R. 1, 523). That judgment also sustained the validity of petitioner's *ex parte* Nevada divorce decree, but petitioner does not seek review of that part of the judgment (R. 3).

Respondent brought this action for a separation and for maintenance on the grounds of cruelty, abandonment and non-support (R. 12). Petitioner being a nonresident, and not found within the State of New York, service of the summons was made pursuant to an order for publication (R. 10), and jurisdiction to make a money award to respondent was acquired by sequestration and seizure of petitioner's assets and property within New York pursuant to an order of sequestration (R. 5). Both orders are dated April 21, 1954.

On April 30, 1954, petitioner served a notice of special appearance (R. 17), and followed it by a motion to dismiss the complaint and to vacate the orders of publication and sequestration on the grounds that the court lacked jurisdiction of the person of petitioner and the subject of the action. In challenging such jurisdiction, petitioner did not attack the sufficiency of the publication and sequestration papers or the regularity of the proceedings thereunder. This attack was based solely upon the existence of an *ex parte* Nevada divorce decree obtained by petitioner on June 30, 1953, in an action in which jurisdicton of the person of respondent herein had not been acquired. That motion was denied (*Vanderbilt* v. *Vanderbilt*, 133 N. Y. S. 2d 314, not officially reported).

On July 1, 1954, petitioner served his answer setting forth a general denial, and pleading as two affirmative defenses the objections to jurisdiction of person and subject which were overruled on his aforementioned motion (R. 18).

A seven day trial was held in the New York Supreme Court. Both parties presented evidence relating to the validity of petitioner's alleged Nevada domicile. During the course of the trial the court rendered a decision holding that domicile valid and that petitioner's *ex parte* Nevada divorce decree was a bar to respondent's right to a separation (R. 342-5). The court, however, did not dismiss the complaint in its entirety, but continued the trial on the remaining issue of

maintenance in order to ascertain whether or not respondent was entitled to maintenance under Section 1170-b of the New York Civil Practice Act, which became a law on April 13, 1953 (R. 345-6).

Throughout the trial petitioner participated in contesting the action, not only upon the alleged jurisdictional grounds, but also on the merits, encompassing all of the issues raised by the pleadings.

The trial court awarded respondent maintenance under Section 1170-b, New York Civil Practice Act, holding that, although petitioner's Nevada *ex parte* divorce decree was effective to dissolve the marriage, it was not effective to extinguish respondent's right to maintenance (R. 505, 2).

Petitioner appealed to the Appellate Division and the Court of Appeals from the judgment entered herein, except from that part thereof which recognized the validity of his *ex parte* Nevada divorce decree (R. 1, 523). The judgment was affirmed in each instance (R. 524, 554, 556).

The parties were married in Connecticut in September, 1948 (Pltf.'s Ex. 1; R. 33). At that time and from 1945 California was petitioner's domicile (Pltf.'s Ex. 19; R. 277). They then came to live in New York where they resided from time to time (R. 34, 42, 43). Although they traveled extensively throughout this country and abroad they never set foot in the State of Nevada during their married life together (R. 42, 273).

After their marriage, the parties became domiciled in California (R. 45, 541). In September, 1952, while they were so domiciled in California, petitioner abandoned respondent (R. 90-94, 527). Prior to his abandonment of respondent, petitioner committed repeated acts of cruelty which affected her health (R. 46-88). After the abandonment, respondent returned to New York in February, 1953 where she became domiciled and continued to reside up to the present time (R. 41, 96, 541).

Respondent being destitute, she was dependent upon charitable agencies in New York for her subsistence. The

Appellate Division found that respondent was a public charge in the State of New York (R. 537).

On June 30, 1953 petitioner obtained a decree of divorce in Nevada (Deft.'s Ex. A; R. 31). That decree was based upon a residence alleged to have been commenced on March 5, 1953, and upon constructive service of the summons dated June 6, 1953, pursuant to an order for publication also dated June 6, 1953 (R. 314-16 Deft.'s Ex. A; R. 31). Respondent did not appear in, answer, or defend, that action, and the judgment of divorce was entered *ex parte* (R. 273-4, 530); the Nevada court did not obtain jurisdiction of the person of respondent herein (R. 507, 530, 541).

The complaint in the Nevada action did not set forth any facts with respect to an allowance or disallowance of maintenance to Mrs. Vanderbilt, and no evidence was presented and no findings were made in the action with respect thereto. The complaint therein alleges a cause of action for the sole relief of dissolving the marital status, and the decree of divorce makes no mention of alimony (Deft.'s Ex. A; R. 31).

The use, made in petitioner's brief of references to a prior separation action instituted by respondent in New York, and the denial of an injunction in that action, is misleading, because both are wholly irrelevant to this action. The prior separation action was commenced by respondent on October 1, 1952, and was dismissed on February 27, 1953, solely on the jurisdictional ground that the statutory residential requirements had not been established as of the date of the commencement of that action (Deft.'s Ex. G; R. 231). The injunction, sought by respondent in that prior action, to enjoin petitioner's prosecution of the Nevada divorce action was denied on July 3, 1953, for the twofold reason that the action in which that motion was made had already been dismissed for lack of jurisdiction, and that the Nevada action had proceeded to judgment on June 30, 1953, thus rendering moot the motion to enjoin the prosecution thereof (Deft.'s Ex. H; R. 234).

Chronology of Events

1945		
		Petitioner established his domicile in California[1] (Pltf.'s Ex. 19; R. 277).
1948		
September	7	The parties were married (Pltf.'s Ex 1; R. 33).
1950		
January		The parties established their domicile in California (R. 45, 541).
1952		
September		Petitioner abandoned respondent in California (R. 90-94, 527).
1953		
February	12	Respondent established her domicile in New York (R. 41, 96, 541).
March	5	Petitioner allegedly established his residence in Nevada (R. 314-16).
April	13	Section 1170-b, New York Civil Practice Act was enacted and became effective.
June	6	Summons and order for publication issued in petitioner's action for divorce in Nevada (Deft.'s Ex. A; R. 31).

[1] Plaintiff's Exhibit 19: "I am now lecturing in the States in the East in order to be near my mother but it has been and still is my intention to return to my permanent domicile in California as soon as possible. It has always been my intention since I established my domicile in California in or about the year 1945, and still is my intention to maintain California as my permanent domicile and to return there despite the fact that I am obliged for business and personal reasons, to depart therefrom from time to time." (From affidavit of petitioner, dated November 18, 1952.)

June 30 Decree of divorce made and entered in petitioner's Nevada *ex parte* divorce action (Deft.'s Ex. A; R. 31).

1954

April 21 Order for publication and order for sequestration made in the New York Supreme Court in the instant action (R. 5, 10).

Summary of Argument

The Nevada *ex parte* divorce decree, having been rendered in an action in which personal jurisdiction of respondent was not acquired, was effective only to dissolve the marital status, and ineffectual to diminish or extinguish respondent's personal right to maintenance. In recognizing the Nevada divorce decree as dissolving the marital status, and in awarding maintenance to respondent, the New York court has accorded faith and credit to the Nevada decree to the fullest extent required by the Constitution.

The question of whether or not a state should enforce the unextinguished support obligation after an *ex parte* divorce is not a federal question, but one of state policy. In so dealing with the protection of the rights of its domiciliaries, each state, for itself, has the right to determine such policy without conflicting with the Federal Constitution.

In *Estin* v. *Estin*, 334 U. S. 541, New York had declared its policy to be that the support obligation will be enforced after an *ex parte* divorce decree; but procedural obstacles peculiar to New York prevented the enforcement of that obligation in the absence of a support order obtained prior to the divorce decree. Section 1170-b of the New York Civil Practice Act was enacted to furnish the procedural means by which such support obligation could be enforced where no prior support order existed.

Petitioner's reliance upon *Thompson* v. *Thompson*, 226 U. S. 551, is erroneous. Since this Court's decision of the

Estin case, and its application of the rule of *Pennoyer* v. *Neff*, 95 U. S. 714, to the separable personal right to maintenance, the *Thompson* case, to the extent that it may be construed to hold that the state of the matrimonial domicile may extinguish the right of maintenance of a wife over whom no personal jurisdiction was acquired, is no longer cognizable authority.

Section 1170-b may not be validly criticized on the ground that it authorizes the maintenance of a separation action although the husband may interpose an *ex parte* divorce decree as a defense which may thereafter be sustained. The form of action or remedy is a subject strictly within the sphere of state power, and if the remedy established by the state affords due process of law, the form of action authorized presents no federal question reviewable here.

In authorizing an action for separation, the New York legislature did not deny full faith and credit to petitioner's *ex parte* divorce decree. It merely authorized the maintenance of an omnibus action in which all of the issues may be determined, including the validity of the husband's *ex parte* divorce decree, if it should be tendered as a defense. In such action, the relief may be accommodated to the facts established—a separation may be granted if the husband's divorce decree is not sustained, and a separation would be denied and maintenance may be granted if the divorce decree is sustained.

Respondent's right to maintain this action under the requirements of New York law raises no federal question. The courts below have found that respondent has complied with all procedural conditions precedent imposed by New York law for the maintenance of this action, and such finding is not reviewable here.

Any finding of fact on marital misconduct made in the Nevada *in rem* proceeding with respect to the marital status only is not binding on respondent in this action for a separation and maintenance.

Article I, Section 10 of the Constitution does not apply to the marriage relation.

The Nevada court did not consider either a grant or denial of alimony in the *ex parte* divorce proceeding. No mention is made of alimony in the complaint, testimony, findings or decree. The Nevada alimony statute permitting an award of alimony without regard to marital fault, contemplates an inquiry by the court into the financial resources and needs of the parties regardless of which party is granted the divorce. The absence of such inquiry and any reference to alimony in the Nevada record, supports the presumption that the Nevada court did not adjudicate on that subject, and refrained from so doing because it followed the pronouncements of this Court in the *Estin* case, that jurisdiction was lacking to make such an adjudication. No adjudication having been made on the subject of alimony by the Nevada court, the New York court, in any event, was not foreclosed from making an award of alimony, and on the authority of *Armstrong* v. *Armstrong,* 350 U. S. 568, there is no question here presented under the Full Faith and Credit Clause.

Section 1170-b, neither by its terms, nor as construed by the Court of Appeals in this case, makes any discriminatory distinction between *ex parte* divorce decrees obtained in New York and those rendered in other states. The opinion below expressly states that the statute must be interpreted as applying with equal effect to *ex parte* divorce decrees rendered in New York and elsewhere. The Report of the Law Revision Commission of the State of New York, which accompanied the recommendation for enactment of that statute expressly declares that the statute was drafted so as to apply with equal effect to New York *ex parte* divorce decrees in order that any claim of discrimination may be avoided.

There was no discrimination practiced in the sequestration of petitioner's assets within the State of New York. Section 1171-a, C. P. A., which provides for sequestration makes no distinction between residents and nonresidents. The only criterion is whether the defendant can be found within the state for personal service of process. Furthermore, it is not discriminatory for a state to make a distinction between residents and nonresidents as regards attachment and sequestration.

The requirements of due process were satisfied by giving petitioner adequate notice of respondent's claim against him and a reasonable opportunity to be heard in defense thereof, through service by publication and sequestration of his assets. Petitioner availed himself to the fullest possible extent of his opportunities for defense by making and defending pre-trial motions and appeals, and actively participating in the contest, on the merits, of all of the issues presented by the pleadings during a seven-day trial.

Petitioner was not denied a fair trial. The record shows, and the courts below have found, that petitioner was afforded a full and fair opportunity to present any proof in defense of respondent's evidence of misconduct, which petitioner desired to offer. Petitioner made no offer of such proof, and the record shows that his failure to do so was by design and not the result of preclusion.

The identical phrase "as justice may require" contained in Section 1170-b, is also contained in Sections 1155 and 1170 of the New York Civil Practice Act, which have governed the awards of alimony in New York for many years. This phrase has been interpreted by the Court of Appeals herein as vesting the courts with discretionary power to determine the question of alimony. The New York courts have construed and applied this phrase through the years, and it now has a meaning universally known, and it has attained the significance of a phrase of legal art. The standard is, therefore not new, untried, obscure or indefinite.

In any event, by appealing only from that part of the judgment which affects him adversely, and by accepting the benefits of the same judgment which sustains the validity of the Nevada divorce decree, petitioner has precluded himself from claiming that the judgment was rendered without due process of law.

ARGUMENT

POINT I

THE AWARD OF ALIMONY DOES NOT VIOLATE THE FULL FAITH AND CREDIT CLAUSE OF THE CONSTITUTION.

It is petitioner's chief claim that his Nevada decree dissolving the marital status also extinguished his obligation to support respondent, and that the judgment herein, to the extent that it awarded maintenance, is in conflict with the Full Faith and Credit Clause of the Federal Constitution.

It was conceded, and the courts below found, that the divorce decree relied upon by petitioner was made in Nevada in an *ex parte* proceeding wherein jurisdiction of the person of respondent was not acquired (R. 273-4, 507, 530, 541).

The award of maintenance herein is based upon the concept of what is now commonly known as "divisible divorce," which was established by this Court in *Estin* v. *Estin*, 334 U. S. 541. The rationale of the decision in that case rests upon the principle established in *Pennoyer* v. *Neff*, 95 U. S. 714, that the court of a particular state cannot extend its jurisdiction beyond its borders and adjudicate personal rights of nonresidents without first having acquired jurisdiction *in personam* over them. In applying that principle to marriage and divorce this Court held that a divorce decree based upon constructive service without *in personam* jurisdiction of the wife may be effective to dissolve the marital status, but is ineffectual to alter or extinguish the personal right of the absent nonresident wife to maintenance, because of the lack of jurisdictional power to make such determination.[2]

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[2] *Krieger* v. *Krieger*, 334 U. S. 555;
Esenwein v. *Esenwein*, 325 U. S. 279;
May v. *Anderson*, 345 U. S. 528;
Hopson v. *Hopson*, 221 Fed. (2d) 839.

On this subject, this Court stated in *Estin* v. *Estin* (334 U. S. 541), at page 549:

> "The result in this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony. It accommodates the interests of both Nevada and New York in this broken marriage by restricting each State to the matters of her dominant concern."

The only difference between the facts in the *Estin* case, and those here presented is that here, the wife, a domiciliary of New York, had not had the opportunity to procure a judgment for alimony prior to the rendition of the Nevada *ex parte* divorce decree in favor of the husband. In conformity with a predetermined plan, petitioner went to Nevada to take advantage of its six-week residence statute, where he obtained his "quickie" divorce before respondent, domiciled in New York with a one-year residence requirement, could bring this action (Pltf.'s Ex. 22; R. 287).[3]

Mr. Justice Black, in his concurring opinion in *Armstrong* v. *Armstrong*, 350 U. S. 568, pointed out that the wife's right to support, unreduced to judgment, like Mrs. Estin's right to support after judgment, is the kind of personal right which cannot be adjudicated without personal jurisdiction having first been obtained over her. (See also *Hopson* v. *Hopson*, 224 Fed. (2d) 839, 844.)

There can be no distinction, in law or in reason, between a legal right, prior to judgment, and such right after judgment, in so far as concerns the protection thereof under the Due Process Clause of the Federal Constitution. Both are personal rights which cannot be altered, extinguished or divested without due process of law. Lacking *in personam* jurisdiction over respondent herein, the Nevada court could

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[3] Plaintiff's Exhibit 22 is a letter admittedly dictated by petitioner on December 6, 1952, before the commencement of the hearings in the prior separation action (R. 286-7).

not, by its *ex parte* judgment, constitutionally diminish or extinguish her personal right to maintenance.

In the *Armstrong* case, by its affirmance of the award of alimony by Ohio after the husband obtained a valid *ex parte* divorce in Florida, this entire Court was in agreement that an *ex parte* divorce decree, dissolving the marital relation, did not *ipso facto* extinguish the wife's right to maintenance.

Petitioner here argues, as the husband in the *Estin* case argued, that New York having recognized his constructive service divorce decree, no legal incidents of the marriage remained under New York law. The answer to that argument was given by this Court in the *Estin* case as follows (p. 544):

> "The difficulty with that argument is that the highest court in New York has held in this case that a support order can survive divorce and that this one has survived petitioner's divorce. That conclusion is binding upon us, except as it conflicts with the Full Faith and Credit Clause. It is not for us to say whether that ruling squares with what New York courts said on earlier occasions. It is enough that New York today says that such is her policy."

The question of enforcement of the support obligation unextinguished by a constructive service divorce decree obtained by the husband, is a matter of state policy which each state must decide for itself. It was so held by this Court in the *Estin* case. Respondent being a domiciliary of New York, that state, acting within the scope of its sovereign power to determine its own policy, had the power to preserve and enforce respondent's right to maintenance. The exercise of such power does not present a federal question reviewable by this Court.

Since the *Estin* case, New York's policy respecting the enforcement of the support obligation after an *ex parte* divorce, has been clearly reaffirmed by the New York Legislature in the enactment of Section 1170-b, C. P. A. and the opinion of the New York Court of Appeals interpreting that statute in this case.

The Statute.

The *Estin* case involved a wife who had procured a New York judgment for maintenance before the husband obtained his *ex parte* divorce decree. The Law Revision Commission of the State of New York in a desire to eliminate any doubt as to the New York policy respecting survival of the support obligation after an *ex parte* divorce, even though the wife *had not* obtained a decree for her maintenance prior to such divorce, recommended the enactment of Section 1170-b of the New York Civil Practice Act, stating in its report (Legislative Document (1953) No. 65 (K) (p. 467)):

> "A wife who has obtained in New York a separation order with maintenance provisions may enforce these provisions against her husband even though he may subsequently have obtained an *ex parte* foreign divorce entitled to recognition under the Full Faith and Credit Clause of the Constitution of the United States. Estin v. Estin, 334 U. S. 541, 58 Sup. Ct. 1213, 92 L. Ed. 1561 (1948). The husband's divorce must be recognized as altering the marital status of the parties under the second Williams case (Williams v. North Carolina, 325 U. S. 226, 65 Sup. Ct. 1118, 89 L. Ed. 1577 (1942)), but since the New York law was interpreted to permit a maintenance order in a separation action to survive a divorce, the prior maintenance order still prevails as far as the economic relations of the parties are concerned.
>
> "The Estin case called attention to the injustice to a New York wife whose husband has obtained a divorce in another state in an *ex parte* proceeding. Unless she had been able to get a separation order with maintenance prior to the foreign divorce, she has no remedy. Under the Civil Practice Act maintenance of the wife may be granted only as an incident to relief in a matrimonial action. Since 1883 it has been accepted law, moreover, that there is no inherent

power in the Supreme Court to grant maintenance to a wife independent of statutory authority. Ramsden v. Ramsden, 91 N. Y. 281 (1883)."

The report of the Law Revision Commission, quoted from *supra*, shows that one of the purposes of the enactment was to overcome the line of New York cases exemplified by *Ramsden* v. *Ramsden*, 91 N. Y. 281 (1883), holding that there is no inherent power in the New York court to grant maintenance to a wife unless she is successful in obtaining the principal relief in a separation or divorce action.

Long before the enactment of Section 1170-b, New York had declared its public policy to be that the obligation to maintain the wife survived the husband's successful prosecution of an *ex parte* divorce action and was enforceable (*Estin* v. *Estin*). In the *Estin* case, however, the procedural difficulties which would have confronted respondent (but for Sec. 1170-b) presented no obstacles, because Mrs. Estin had already obtained a judgment of separation with maintenance before her husband obtained his divorce; the court merely had to enforce an existing decree. Hence, until the enactment of Section 1170-b, the anomalous situation prevailed in New York where its public policy recognized the survival of the support obligation after an *ex parte* divorce, but there existed no procedural vehicle for the enforcement of the support obligation where the wife had no order or decree for support prior to the husband's *ex parte* divorce decree.

In enacting Section 1170-b, New York followed the path charted by this Court in its decision of the *Estin* case, where it declared that a constructive service divorce is not denied full faith and credit when post-divorce maintenance is awarded to a wife whose personal rights were not and could not be altered or divested *in absentia* in an *in rem* divorce proceeding.

Petitioner's citation of *Lynn* v. *Lynn*, 302 N. Y. 193, for the proposition that a Nevada decree was recognized in New York, as extinguishing the wife's right to support, is completely misleading because the facts in that case were mate-

rially different. The significant factual difference between the *Lynn* case, and the case at bar is, that in the *Lynn* case, the Nevada divorce judgment was one *in personam*, and was rendered in a divorce action in which the wife *appeared* and *defended*. Even though the New York Court of Appeals held that Mrs. Lynn's right to alimony was extinguished by the *in personam* Nevada divorce decree, nevertheless it reaffirmed its recognition and approval of the divisible divorce doctrine by making the following observations (p. 200):

> "The 'divisible divorce,' anomalous though it may at first appear, has become a recognized concept; it is now familiar law that a divorce decree may be completely effective to dissolve a marriage and yet completely ineffectual to alter certain legal and economic incidents of that marriage."

The allowance of maintenance to a wife after an *ex parte* divorce decree has been procured by the husband is neither revolutionary nor novel. The courts in many states, and as early as 1870, have granted such allowances under their general equity powers, notwithstanding the existence of a valid *ex parte* divorce decree previously rendered in favor of the husband (42 A. L. R. 1392, and cases there cited). New York, however, being procedurally circumscribed as to alimony without Section 1170-b, was unable to attain the results accomplished in other states, if there was no support order prior to the divorce decree.

Petitioner argues that the state of the matrimonial domicile has the power to extinguish the wife's personal right to support in a constructive service divorce action. In support of that argument petitioner rests upon *Thompson* v. *Thompson*, 226 U. S. 551. That decision is no longer the law today because it was based upon the rule in the case of *Haddock* v. *Haddock*, 201 U. S. 562, which was expressly overruled by this Court in *Williams* v. *North Carolina*, 317 U. S. 287, 304. The *Thompson* case rests upon the idea that the existence of the matrimonial domicile within a state confers jurisdic-

tional power upon the courts of that state to determine personal rights of an absent wife over whom no personal jurisdiction was acquired. This idea has been overturned by the *Estin* case, and the cases thereafter decided by this Court.[4] In any event any remaining doubt that the *Thompson* case, is no longer accepted law, is dispelled by the concurring opinion of Mr. Justice Black in *Armstrong* v. *Armstrong*, 350 U. S. 568, where it was stated:

> "To the extent that the Thompson decision can be considered as in any way inconsistent with Pennoyer v. Neff and Estin v. Estin, the Thompson case should no longer be considered to be the law."

In any event, even the outmoded and archaic concept of matrimonial domicile is not available to petitioner on the facts herein. California and not Nevada is the state in which the parties last resided together as husband and wife and, therefore, California and not Nevada is the matrimonial domicile. When petitioner abandoned respondent in California she established her separate domicile in New York, and one month later petitioner commenced his residence in Nevada (R. 96, 314-16). Respondent having thus established her legal separate domicile in New York, as such domiciliary, she became entitled to the benefits and protection of the laws of the State of New York and she became a subject of legitimate interest for that state.

Thus, if it be assumed that the Nevada court considered the question of alimony and decided that question adversely to respondent, nevertheless, that court lacked the jurisdictional power to adjudicate on that personal right of respondent and New York did not violate the Full Faith and Credit Clause by rendering its judgment awarding maintenance to respondent.

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[4] *Kreiger* v. *Kreiger*, 334 U. S. 555; *May* v. *Anderson*, 345 U. S. 528.

The Form of Action Authorized by Section 1170-b.

Petitioner criticizes Section 1170-b on the ground that it authorizes an action for a separation notwithstanding the fact that the husband may, in such action, interpose a defense of an *ex parte* divorce decree which may ultimately prove to be valid and a bar to the granting of a separation.

In making this criticism, petitioner overlooks the fact that until he establishes the existence of the divorce decree the New York court has no actual or constructive knowledge of its existence. Petitioner's Nevada divorce decree had no vitality in New York until it was made a judgment in New York. In *Williams* v. *North Carolina*, 325 U. S. 226, 229, this Court stated:

> "But the Clause does not make a sister-state judgment a judgment in another State. The proposal to do so was rejected by the Philadelphia Convention. 2 Farrand, The Records of the Federal Convention of 1787, 447, 448. 'To give it the force of a judgment in another state, it must be made a judgment there.' McElmoyle v. Cohen, 13 Pet. 312, 325, 10 L. Ed. 177. It can be made a judgment there only if the court purporting to render the original judgment had power to render such a judgment. A judgment in one State is conclusive upon the merits in every other State, but only if the court of the first State had power to pass on the merits—had jurisdiction that is, to render the judgment."

In enacting Section 1170-b, the legislature authorized the courts, amongst other things, to grant maintenance even if the wife were unsuccessful in obtaining a separation or divorce by reason of the existence of a valid constructive service divorce decree obtained by the husband.

That statute sanctions an omnibus action in which all issues relating to separation, maintenance and the validity of the *ex parte* divorce may be litigated and in which relief

appropriate to the facts may be granted, thus avoiding a multiplicity of suits.

The legislature having the power to prescribe the means by which the husband's obligation to support his wife may be enforced, the particular *form* of action created by the legislature for that purpose is not a valid ground for criticism of the statute and no federal question is thereby presented. *Simon* v. *Craft*, 182 U. S. 427, 437; *Francis* v. *Resweber*, 329 U. S. 459.

In *Simon* v. *Craft*, *supra*, this Court stated at page 437:

> "But the due process clause of the Fourteenth Amendment does not necessitate that the proceedings in a state court should be by a particular mode, but only that there shall be a regular course of proceeding in which notice is given of the claim asserted and an opportunity afforded to defend against it. Louisville & Nashville Railroad Co. v. Schmidt, 177 U. S. 230, 236, and cases cited. If the essential requisites of full notice and opportunity to defend were present, this court will accept the interpretation given by the state court as to the regularity under the state statute of the practice pursued in the particular case."

It is of interest to note that in the *Armstrong* case, the wife was permitted to prosecute an action for a divorce in Ohio, notwithstanding the existence of the husband's prior Florida divorce decree. The Ohio court, in sustaining the husband's divorce, denied a divorce to the wife but made an award of alimony. On certiorari, this Court affirmed the Ohio judgment and did not strike it down despite the fact that the action in which the judgment was rendered in Ohio was in the *form* of an action for a divorce.

The New York Court of Appeals, by its affirmance of the judgment herein, has ruled that all proceedings herein are regular and that the judgment was duly rendered in accordance with state procedure.

It is fundamental that each state may determine for itself the form of action or remedy, the procedure for the commencement of actions, the limits of its jurisdiction and the character of actions and controversies which shall be heard in its courts.

Chambers v. *Baltimore & Ohio R. R.*, 207 U. S. 142;

Hardware Dealers Mutual Fire Insurance Co. v. *Glidden Co.*, 284 U. S. 151, 158;

Brown v. *Mississippi*, 297 U. S. 278, 285;

Louisville & Nashville Railroad Co. v. *Schmidt*, 177 U. S. 230, 236.

In *Hardware Dealers Mutual Fire Insurance Co.* v. *Glidden Co.*, 284 U. S. 151, this Court stated at page 158:

> "* * * the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control. The Fourteenth Amendment neither implies that all trials must be by jury nor guarantees any particular form or method of state procedure. See Missouri ex rel. Hurwitz v. North, 271 U. S. 40. In the exercise of that power and to satisfy a public need, a state may choose the remedy best adapted, in the legislative judgment, to protect the interests concerned, provided its choice is not unreasonable or arbitrary, and the procedure it adopts satisfies the constitutional requirements of reasonable notice and opportunity to be heard."

Petitioner contends that Section 1170-b, contains a "command to deny full faith and credit to an out-of-state *ex parte* divorce decree." That statute makes no such direction. In fact, there is a tacit direction, implicit in that statute, that the court must deny the separation if the husband's *ex parte* divorce decree is presented to the court and is recognized as a valid decree.

Respondent's Right to Maintain This Action.

Petitioner contends that the Full Faith and Credit Clause was violated when respondent was permitted to maintain this action based upon a one-year residence in New York, which was commenced before petitioner's Nevada divorce decree was rendered, and completed thereafter.

When petitioner abandoned respondent in California, respondent went to New York, and, as an abandoned wife, she had the right to establish her separate domicile in New York. *Hunt* v. *Hunt*, 72 N. Y. 217, 242; *Dean* v. *Dean*, 241 N. Y. 240, 244; *Matter of Daggett*, 255 N. Y. 243, 247. Respondent exercised that right when she came to New York in February, 1953, which was several months before the Nevada divorce decree was rendered, and, in fact, one month before petitioner established his residence in Nevada (R. 41, 96, 341, 314-16; Deft.'s Ex. A; R. 31).

When respondent came to New York and established her separate domicile here she was the wife of petitioner and, as a New York domiciliary, she was endowed with all of the rights of a married woman conferred by the laws of the State of New York, including the right to maintenance. The Nevada *ex parte* divorce decree did not extinguish her personal right to maintenance, nor did it deprive her of her right to continue her New York domicile already established by her.

The fact that respondent had not completed her one-year residence in New York when the Nevada divorce decree was rendered did not result in the extinguishment of her right to support which she then had, it merely postponed the time for the enforcement of that right.

Respondent's right to maintain this action and her compliance with the residential requirements imposed by New York for its maintenance is a procedural matter which presents a state and not a federal question. This question already has been resolved below in favor of respondent by the court of last resort in New York as follows (343, 346):

"Plaintiff, having resided in this State for the required one-year period, had standing to bring such a suit and jurisdiction was effected by the sequestration of defendant's New York assets." (R. 543)

* * * * *

"That right she exercised in this instance before the Nevada judgment was entered and she satisfied New York's residence requirements before suing for a separation (Civ. Prac. Act, Sec. 1165-a)." (R. 546)

It is settled law that matters affecting procedure, practice and the remedy sought to be enforced are governed by state law, and a decision of the state court on those matters is not reviewable by this Court and does not present a federal question. *Central Vermont Ry. Co.* v. *White*, 238 U. S. 507; *Hardware Dealers Mutual Fire Insurance Co.* v. *Glidden Co.*, 284 U. S. 151, 158. *Simon* v. *Craft*, 182 U. S. 427, 436-7.

Petitioner expresses concern that Section 1170-b will create problems for New York by encouraging wives to come to New York to take advantage of that statute in obtaining support. Such fears have not been shared by the legislature or the courts of New York in the enactment of the statute and in making and affirming the judgment herein. In any event such fears are ill-founded because no action could be brought there by the wife unless the husband or his property can be found in New York, otherwise New York would lack jurisdiction to make any money award. Therefore, it is the husband who would attract his abandoned wife to the State of New York, either by his presence within the state or by having brought his property there.

Moreover, the problem of attraction of migratory litigants presents a state rather than a federal question. The legislature and the highest court in New York have left no doubt as to the policy of New York on this score.

Res Judicata as to Misconduct.

Petitioner urges that the finding of the Nevada court was res judicata on the issue of marital misconduct and precluded the New York court from finding that petitioner was guilty of such misconduct, and he suggests that in doing so New York has denied full faith and credit to the Nevada decree.

The determination of misconduct was made by the Nevada court in an *in rem* divorce proceeding which involved the marital status only.

In this action the findings that petitioner was guilty of misconduct were made in connection with the court's inquiry as to whether respondent was entitled to an award of alimony within the purview of the phrase "as justice may require" contained in Section 1170-b.

The authorities uniformly hold that whatever facts are found in an action *in rem* are limited to the *res* before the court and are not binding upon the absent litigant in any subsequent litigation not involving the *res*. Therefore, any finding of fact on marital misconduct made in the Nevada *in rem* proceeding with respect to the marital status only, cannot be binding upon respondent in this action and is not *res judicata* of such issues on matters not involving status.

Baker v. *Baker, Eccles & Co.*, 242 U. S. 394, 401, 403;

Riley v. *N. Y. Trust Co.*, 315 U. S. 343;

Freeman On Judgments (5th Ed.) Sec. 1524;

Restatement of the Law of Judgments, Secs. 73-74 (American Law Institute);

Durant v. *Abendroth*, 97 N. Y. 132, 141;

Maynicke v. *Maynicke*, 274 N. Y. S. 864, 870, 152 Misc. 727;

Thurston v. *Thurston*, 58 Minn. 279, 59 N. W. 1017;

28 A. L. R. 2d 1391, and cases there cited.

We quote from Section 74 of the Restatement of the Law on Judgments (American Law Institute), as follows:

> "c. *Effect of judgment on other causes of action.* Although a valid judgment *in rem* is binding on all the world as to the existence of a status which is the subject of the action, it is not conclusive as to a fact upon which the judgment is based in any subsequent action (not involving the existence of the status) except as to persons who have appeared and actually litigated the question of the existence of the fact."

There Has Been No Violation of the Constitutional Prohibition Against the Impairment of Contracts.

Petitioner argues obscurely that Section 1170-b unconstitutionally imposed a post-marital burden upon petitioner which did not exist before, and cites the provisions of the Federal Constitution which prohibit the passage of any law impairing the obligation of contracts (Art. I, Section 10). This Court has held in *Maynard* v. *Hill*, 125 U. S. 190, that those provisions of the Federal Constitution have no application to the marriage relation.

Nevada Did Not Adjudicate on the Subject of Alimony.

Under the Nevada statute (Section 9463, Nevada Compiled Laws)[5] alimony may be awarded to a wife without regard to marital fault. *Lewis* v. *Lewis*, 289 P. 2d 416 (1955). That statute contemplates that, in making a determination to grant or deny alimony, the court shall make inquiry as to the existence of property of either spouse and to make an investigation thereof with a view to make such adjustment as shall be equitable between the parties under all circumstances of the particular case. *Buaas* v. *Buaas*, 62 Nev. 232, 147 P. 2d 495.

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[5] See Appendix, page 38.

The judgment roll in petitioner's Nevada divorce action which is Defendant's Exhibit A herein (R. 31), includes the summons and complaint, the testimony, findings and the decree. That record shows that petitioner did not seek a denial of alimony in his complaint; there was no testimony adduced at the trial with respect to the financial means of the parties, their respective needs, or any other matter relevant to the issue of granting or denying alimony to the wife. The findings and decree make no reference to alimony, its grant or denial.

In view of the requirements of the Nevada statute, and the state of the record of the divorce proceedings there, it is evident that the Nevada court did not consider or decide either a grant or denial of alimony to the wife.

The fact that the Nevada court refrained from considering or adjudicating upon the subject of alimony is consistent with the pronouncements of this Court in *Estin* v. *Estin*, 334 U. S. 541; and *Kreiger* v. *Kreiger*, 334 U. S. 555, that a court has no power to adjudicate upon the personal right of the wife to alimony in an action *in rem* where jurisdiction of her person has not been obtained.

It is reasonable to presume that Nevada would not violate the rule established by this Court in those cases, and the record of the Nevada divorce action fully supports this presumption.

In the absence of an adjudication by Nevada on the subject of alimony, New York, in any event, was not foreclosed and was free to decide the question of alimony in the instant case without conflicting with any adjudication by the Nevada court. Hence, the award of alimony by the New York court presents no question under the Full Faith and Credit Clause. *Armstrong* v. *Armstrong*, 350 U. S. 568.

POINT II

SECTION 1170-b APPLIES WITH EQUAL EFFECT TO EX PARTE DIVORCE DECREES OBTAINED IN NEW YORK AS WELL AS IN OTHER STATES.

Petitioner erroneously argues that section 1170-b, is discriminatory. That argument is based upon the false premise that the statute does not apply to New York *ex parte* divorce decrees.

The New York Law Revision Commission[6] proposed the enactment of 1170-b, and pointed out in its report that it drafted the statute with special regard to avoid any possible claim of discrimination so that it would apply with equal effect to all *ex parte* divorce decrees, whether obtained in New York or elsewhere. We quote from that report (p. 468):

> "In order to avoid discrimination against foreign divorces, against which the Estin opinion warned, such legislation should be made applicable whether the husband's *ex parte* adjudication of marital status was obtained in a foreign court or a New York court."

Section 1170-b (Pet.'s Br., p. 4) was enacted in the form proposed by the Law Revision Commission, and by its terms makes no distinction between *ex parte* divorces obtained in New York and those rendered elsewhere.

Petitioner's claim of discrimination was rejected by the Court of Appeals which interpreted the statute as having no discriminatory intention or effect, that Court stating as follows (R. 546-7):

> "Defendant assumes that New York would not enforce its Section 1170-b as against a prior non-personal New York divorce judgment, and then goes on to assume

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[6] Report of N. Y. Law Revision Commission, Legis. Doc. (1953) No. 65(K) (p. 467).

> that New York's suppositious refusal to apply Section 1170-b as against one of its own New York judgments would mean that New York would be giving a foreign judgment less protection than a local judgment as against Section 1170-b. As to defendant's first assumption there is nothing in our statute to support the conclusion that it is inapplicable where the prior judgment was obtained in New York (the Law Revision Commission report and recommendation certainly make no such distinction, but instead recommends applicability 'whether the husband's *ex parte* adjudication of marital status was obtained in a foreign or a New York court.' P. 468)."

Petitioner's contention that the statute is discriminatory is therefore completely refuted by the legislative intent as revealed by the Report of the Law Revision Commission, the clear language of the statute itself, and the unequivocal interpretation of that statute by the New York Court of Appeals in this case.

The Sequestration.

The record does not support petitioner's argument that the sequestration of his property was discriminatory. This argument is based upon another false premise that a husband residing in New York would not have been subjected to the sequestration of his property. From this he concludes that the sequestration was discriminatory.

Section 1171-a, New York Civil Practice Act (Pet.'s Br. App., p. 2A) authorizing sequestration of the husband's property within New York, does not make any distinction between husbands who are residents of the state and those who are not; the criterion is, whether he can be found within the state and be served personally with process. Of course, in the case of a husband resident in New York and amenable to personal service of process within the state, there would be no necessity for publication or sequestration to confer

jurisdiction to render a judgment and to make an award for maintenance. Therefore, there has been no discrimination against petitioner in the granting of sequestration.

Moreover, it is not discriminatory for a state to distinguish between residents and nonresidents with respect to attachment or sequestration of property within the state. *Central Loan and Trust Co.* v. *Campbell Commission Co.*, 173 U. S. 84.

The sequestration was properly granted in this case because Section 1170-b, C. P. A., authorized respondent to maintain an action for separation, and Section 1171-a, C. P. A., permits sequestration in such an action. Sequestration was granted as a proper exercise of the discretion of the court based on papers, the sufficiency of which was never attacked.

The Court of Appeals, by its affirmance of the judgment herein, has conclusively established the propriety and regularity of the sequestration proceedings and no federal question is presented on this issue.

Petitioner, in arguing the question of discrimination, and elsewhere throughout his brief, has employed the technique of challenging Section 1170-b, the judgment herein and the opinion of the Court of Appeals by references to earlier New York decisions which have become obsolete by the enactment of Section 1170-b and the decision of the Court of Appeals in this case. This court in the *Estin* case, rejected that technique. It is fundamental that this Court will accept the pronouncements of the highest court of the state as to what the state law is. The interest of this Court is aroused only in the application of the test of constitutionality under the Federal Constitution to the decisional or statutory law of the state as pronounced or interpreted by the highest court of the state.

Concededly Section 1170-b and the opinion rendered below have accomplished some changes in the law of New York as it existed prior to that enactment and the decision herein (R. 547). However, no one can deny the power of the New York Legislature and the New York Court of Appeals to make such changes, provided no constitutional provisions

have been violated thereby. Therefore there is no necessity for answering any of the petitioner's arguments which relate to the claims of inconsistency between the older New York authorities and Section 1170-b and its application in this case.

POINT III

THERE WAS NO DENIAL OF DUE PROCESS.

Petitioner's claims of lack of due process are frivolous and present no federal question.

Petitioner had Adequate Notice and Opportunity to Defend the Action.

Petitioner raises objections to the complaint with respect to the sufficiency of notice of respondent's claim herein. The complaint fully apprised petitioner as to what respondent was seeking. The complaint showed that the petitioner had committed acts of cruelty and misconduct and that he abandoned respondent; that he had substantial wealth and income and made no provision for the support of respondent. The relief sought in the complaint was for a separation, an award for maintenance out of the property and income of petitioner, and such other and further relief as to the court may seem just and proper (R. 12).

The New York Civil Practice Act has adequate provisions pursuant to which petitioner could have obtained any additional particulars which he considered necessary. As early as June 1956, before answer, on his motion to dismiss the complaint on jurisdictional grounds, petitioner was apprised of respondent's attack upon the validity of his Nevada decree and of respondent's reliance on Section 1170-b for an award of maintenance, if her separation should be barred by a finding of validity of petitioner's decree. The opinion denying that motion confirms those facts. *Vanderbilt* v. *Vanderbilt*, 133 N. Y. S. (2d) 314.

The Court of Appeals, in rejecting that claim as lacking in merit, stated (R. 548):

> "Similarly without substance is defendant's statement that he was given no notice by pleading or otherwise, in this suit brought ostensibly for a separation, that even if no separation were to be granted, an award for maintenance might still be in the offing. Adequate notice was given by the statute itself which warned that if a separation should be refused because of the foreign divorce judgment, maintenance might still be awarded."

Service by publication effectively gave notice to petitioner of the commencement of this action and afforded him an opportunity to defend. Additional effective notice was given to petitioner by the sequestration and seizure of his property in New York. *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306; *Mathews* v. *Mathews*, 247 N. Y. 32; *Geary* v. *Geary*, 272 N. Y. 390.

Throughout this protracted litigation petitioner has availed himself of all the benefits and devices under the law in an endeavor to avoid the fulfillment of his obligation to support respondent. However, at no time has petitioner attacked the sufficiency of the papers and documents upon which the orders of publication and sequestration were based, or the manner of respondent's compliance with said orders.

Not only did petitioner have an opportunity to defend, but he availed himself of that opportunity most vigorously and abundantly. Nine days after the order for publication and sequestration was signed he appeared specially (R. 17). Then he unsuccessfully moved to dismiss the complaint on jurisdictional grounds and, on July 1, 1954, he served his answer and tendered his Nevada *ex parte* divorce decree as a defense to the action herein (R. 18). Thereafter he participated on the merits or pre-trial motions and appeals (R. 27; *Vanderbilt* v. *Vanderbilt*, 284 App. Div. 949, 135 N. Y. S. 2d 622 (2 appeals); *Vanderbilt* v. *Vanderbilt*, 133 N. Y. S. 2d 314, (not officially reported)).

The record of the protracted seven day trial shows that there can be no question that petitioner was afforded an opportunity to be heard and that he took advantage of that opportunity by vigorously participating in a contest on the merits of every issue presented at the trial. His participation at the trial included, among other things, numerous objections, tactical motions and extensive cross-examination of respondent on all aspects of her direct testimony including the issue of misconduct. Petitioner's counsel also introduced affirmative evidence in support of his defenses and in rebuttal of respondent's evidence on the subject of petitioner's finances and income (R. 312, 456, 482, 484, 492).

As a result of his efforts petitioner was successful in obtaining recognition of the validity of his Nevada decree and in keeping to a low figure the amount allowed to respondent for her maintenance.

Petitioner having been afforded a full opportunity to present his evidence and arguments and having availed himself of that opportunity, he cannot be heard to challenge the judgment as having been rendered without due process of law.

In appealing from only part of the judgment, petitioner has accepted the benefits of the judgment herein which recognizes his Nevada decree. However, he attacks the balance of the judgment, claiming a denial of due process of law. *By accepting the benefits of the judgment, petitioner has, in any event, precluded himself from now contending that the judgment was rendered without due process of law. Laing v. Rigney*, 160 U. S. 531.

Petitioner Was Not Denied a Fair Trial.

Petitioner's recital of what happened upon the trial, in an endeavor to sustain his spurious claim of an unfair trial, is deceptive. That recital consists of references to the record, taken out of context, and he omits pertinent portions of the record which dispel any possible claim that petitioner did not have a full and complete opportunity to present whatever evidence he wanted the court to consider.

The nub of the contention with respect to petitioner's claim of denial of a fair trial is, that the trial court had ruled that it would strike out the testimony with respect to petitioner's misconduct. The basis of that claim is a colloquy between the court and petitioner's counsel at the commencement of the trial (R. 39). The evidence with respect to misconduct was thereafter received by the court and no motion was made by petitioner's attorney to strike it out and *that testimony was not stricken out.* That colloquy was preceded by a discussion initiated by petitioner's attorney as to whether the evidence of petitioner's misconduct should be excluded on the ground that the Nevada decree was *res judicata* on that issue. During that discussion respondent's counsel delivered to the trial court a memorandum of law showing that the Nevada *ex parte* divorce decree was not *res judicata* on the subject of misconduct, and that the trial court was not precluded from receiving evidence on that issue (R. 33). Thereafter the trial court did receive that testimony, overruling the repeated objections of petitioner's counsel to the introduction thereof (R. 62, 69, 91, 92, 102, 103, 106); the trial court evidently having concluded that that testimony was admissible and that its introduction into evidence was not precluded by the Nevada *ex parte* decree.

Petitioner also claims that he was precluded from introducing evidence relating to the issue of misconduct, contending that the complaint was dismissed on the merits. He refers to page 349 of the record in support of that claim. The record shows that the complaint was not dismissed in its entirety. The trial court clearly stated that it dismissed only that part of the complaint bearing on the relief of separation and was continuing the case with respect to the issue of maintenance.

Therefore there is no justification for petitioner's contention that the evidence relating to petitioner's misconduct was eliminated from the case. That is confirmed by the remarks

of the trial court upon the partial dismissal of the complaint (R. 344-6, 349-50).[7]

The trial court afforded petitioner's attorney the widest latitude to meet the evidence adduced by respondent.[8]

Petitioner's attorney's omission to present evidence to controvert respondent's charges of misconduct was deliberate and intentional, and there was no ruling by the trial court limiting or excluding any offered proof with respect thereto.

Petitioner's attorney showed throughout the trial that he had no intention of calling the petitioner or anyone else to refute respondent's evidence as to misconduct. The record clearly showed that he relied upon the theory of estoppel, claiming that the Nevada divorce decree was *res judicata* on the issues of petitioner's misconduct (R. 35-6) and he now continues to make such contentions in his brief.

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[7] R. 345:

"Mr. Winsten: Then it is my understanding from your Honor's ruling that the complaint is not dismissed in its entirety. The Court has merely denied the relief of separation, but is entertaining the action and the complaint in so far as it requests support and maintenance?"

"The Court: If there is any question about it, that is exactly what I mean. I said I am continuing the case, but that part of the complaint is dismissed."

[8] R. 345:

"But in so far as the balance of the relief requested, I indicated in the last part of my decision that I am continuing this case in order to take the testimony as to the income, resources *and other necessary information in connection with the claim of maintenance and support under 1170-b.*" (Emphasis supplied.)

R. 350:

"I must first listen to the testimony of the plaintiff who claims that she is entitled to maintenance and support, and let her tell us what she considers necessary for her maintenance and support. *Then you come in and make your argument, or cross-examine her, or submit what you think the law requires or does not require.*" (Emphasis supplied.)

At the *outset* of the trial petitioner's counsel informed the Court as follows:

> "The defendant is not here and does not propose to be here, your Honor." (R. 26)

The record is barren of any attempt on the part of petitioner's counsel to introduce any evidence to refute respondent's charges of petitioner's misconduct.

In any event, both appellate courts below have rejected petitioner's claims that he was precluded from offering such evidence and that he was denied a fair trial. We quote from the opinion of the Appellate Division:

> "On this appeal the husband contends that he had no opportunity to meet these issues, but that is not so. The trial court clearly indicated that after it would decide the motion to dismiss at the close of the wife's case, the husband could meet any issues that he considered relevant." (R. 530 n).

We quote from the opinion of the Court of Appeals:

> "Other charges by defendant of deprivation of due process are without merit. He complains that he was denied a fair opportunity to present proof as to alimony but the record does not bear him out." (R. 548)

This court has held that where a litigant has failed to make any offer of proof with respect to any issue, his alleged misapprehension as to the effect of evidence in the record upon his rights does not constitute a denial of constitutional rights. *Market St. R. Co.* v. *Railroad Commission*, 324 U. S. 548, 559. In that case this Court stated as follows at page 559:

> "But even if a more convincing showing were made that the company had relevant evidence to be heard, we find no adequate excuse for the failure to offer it in the proceeding. No offer was rejected, no request for time to obtain such evidence was denied. A mis-

> apprehension by a litigant of the steps which its best interest require during a trial may be appealing grounds for a plea to the discretion of the hearing tribunal for another chance, but it is not grounds for our interference as a denial of constitutional rights."

The Phrase "As Justice May Require" in Section 1170-b Is Not Vague.

The complete answer to petitioner's complaint of vagueness is the interpretation of that phrase by the Court of Appeals herein as follows (R. 548):

> "He complains as to the vagueness of the phrase in section 1170-b, 'as justice may require.' But that same phrase has been for many years in section 1170 of the Civil Practice Act with respect to questions of custody of children and temporary and permanent alimony in separation and divorce suits. It means (see as used in Election Law, § 330) that there are no 'as matter of law' requirements one way or the other as to those matters which are to be dealt with in the discretion of the courts, on all the facts."

The New York Court of Appeals thus has defined that phrase as meaning that the question of alimony is one to be determined by the court in the exercise of its sound discretion upon all the facts and circumstances in each case. Fundamentally the allowance of alimony and the amount thereof involves the exercise of the discretion of the court and depends upon the justice and equities in any particular case, subject to any restriction upon that discretion expressly set forth in that statute.

Petitioner attempts to support his claim of vagueness by reliance on the decision in *Connally* v. *General Construction Co.*, 269 U. S. 385, 391. That case does not support his contention that Section 1170-b is vague and unconstitutional. It dealt with a penal statute, and the question there involved was whether the accused was sufficiently apprised as to what

he was *prohibited* from doing. The rule enunciated in that case with respect to the determination of certainty of legislative enactments as applied to Section 1170-b shows clearly that there can be no challenge for vagueness here. This Court stated at page 391:

> "But it will be enough for present purposes to say generally that the decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, Hygrade Provision Co. v. Sherman, 266 U. S. 497, 502; Omaechevarria v. Idaho, 246 U. S. 343, 348, or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ, Nash v. United States 229 U. S. 373, 376; International Harvester Co. v. Kentucky, supra, p. 223, or, as broadly stated by *Mr. Chief Justice White* in United States v. Cohen Grocery Co., 225 U. S. 81, 92 'that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded'."

The phrase "as justice may require" is a special or technical expression which is also found in Sections 1155 and 1170 of the New York Civil Practice Act (App. p. 37), and for many years it has been the sole standard applied in New York for the allowance of alimony generally in every divorce and separation action brought in New York. Through the years of its existence on the New York statute books, the phrase has been interpreted and applied without question or difficulty. Its meaning is well-known, and it has attained the significance of a phrase of legal art with respect to alimony in matrimonial actions.

The incorporation of the phrase "as justice may require" in Section 1170-b, is evidence of the legislative intent to vest

in the courts, in the application of that statute, the same discretionary powers theretofore vested in the courts with respect to alimony in every other matrimonial action brought in that state. Section 1170-b, therefore, contains no new or unusual standard, nor is the traditional and time-tested standard incorporated therein, vague or unconstitutional.

CONCLUSION

THE JUDGMENT DATED MARCH 30, 1955, AND ENTERED IN THE NEW YORK COUNTY CLERK'S OFFICE ON MARCH 31, 1955, AS THEREAFTER AFFIRMED BY THE NEW YORK COURT OF APPEALS ON MAY 31, 1956, SHOULD BE AFFIRMED.

Dated, March 29, 1957.

Respectfully submitted,

MONROE J. WINSTEN,
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APPENDIX.

New York Civil Practice Act.

§ 1155. Maintenance and support of wife and children in action for divorce by wife.

The court, in the final judgment dissolving the marriage in an action for divorce brought by the wife, may require the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of plaintiff, *as justice requires*, having regard to the circumstances of the respective parties; and, by order, upon the application of either party to the action, and after due notice to the other, to be given in such manner as the court shall prescribe at any time after final judgment whether heretofore or hereafter rendered, may annul, vary or modify such a direction. * * * (Emphasis supplied.)

§ 1170. Custody and maintenance of children, and support of plaintiff in action for divorce or separation.

Where an action for divorce or separation is brought by either husband or wife, the court, except as otherwise expressly prescribed by statute, must give, either in the final judgment, or by one or more orders, made from time to time before final judgment, such directions *as justice requires*, between the parties, for the custody, care, education, and maintenance of any of the children of the marriage, and where the action is brought by the wife, for the support of the plaintiff. The court, by order, upon the application of either party to the action, or any other person or party having the care, custody and control of said child or children pursuant to said final judgment or order, after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment, may annul, vary or modify such directions, or in case no such direction or directions shall have been made, amend it by inserting such direction or directions *as justice requires* for the custody, care, education and maintenance of any such child or children or for the support of the plaintiff in such final judgment or order or orders. * * * (Emphasis supplied.)

§ 9463. Disposition of Property, What Considerations Determine—Effect of Decree on Matters Not Specifically Mentioned—Preliminary Restraining Orders. § 25. In granting a divorce, the court may award such alimony to the wife and shall make such disposition of the community property of the parties as shall appear just and equitable, having regard to the respective merits of the parties and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens, if any, imposed upon it, for the benefit of the children. The court may also set apart such portion of the husband's property for the wife's support and the support of their children as shall be deemed just and equitable. In the event of the death of either party or the subsequent remarriage of the wife all alimony awarded by the decree shall cease, unless it shall have been otherwise ordered by the court. In the event alimony has been awarded to the wife, or the court otherwise adjudicates the property rights of the parties, or an agreement by the parties settling their property rights has been approved by the court, whether or not the court has retained jurisdiction to modify the same, such alimony so awarded, such adjudication of property rights, and such agreements settling property rights, may nevertheless at any time thereafter be modified by the court upon written stipulation duly signed and acknowledged by the parties to such action, and in accordance with the terms thereof. If after the filing of the complaint, it shall be made to appear probable to the court or the judge in action, that either party is about to do any act that would defeat or render less effectual any order which the court might ultimately make concerning the property or pecuniary interests, an order shall be made for the prevention thereof, to be enforced as such preliminary orders are enforced respecting children.